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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF ILLINOIS and SENTRY FOOD STORES, INC.
Petitioners,

v.

ASSOCIATED MILK PRODUCERS, INC., ASSOCIATED MILK DEALERS, INC., ASSOCIATED RESERVE STANDBY POOL COOPERATIVE, CENTRAL MILK PRODUCERS COOPERATIVE and CENTRAL MILK SALES AGENCY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

NEIL F. HARTIGAN
Attorney General, State of Illinois
160 North LaSalle Street
Suite 900
Chicago, IL 60601
(312) 793-3500

ROBERT E. DAVY*
Assistant Attorney General
Acting Chief, Antitrust Division
188 West Randolph Street
Suite 2118
Chicago, IL 60601
(312) 793-2582
Attorneys for Petitioner State of Illinois

ARAM A. HARTUNIAN*
JOEL M. HELLMAN
HARTUNIAN, FUTTERMAN & HOWARD, CHTD.
55 East Monroe Street
Suite 4005
Chicago, IL 60603
(312) 372-6475
Attorneys for Petitioner Sentry Food Stores, Inc.

*Counsel of Record

Pandick Midwest, Inc., Chicago • 454-7600

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PETITIONERS' REPLY BRIEF

This reply brief is jointly submitted by petitioners State Of Illinois ("Illinois") and Sentry Food Stores, Inc. ("Sentry") on their Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit.*

* Sentry has no parent company, subsidiaries or affiliates.

Pursuant to Rule 22.5, this reply is limited to new matters raised in respondents' opposition briefs.

I. Respondents Present an Alternative *Illinois Brick* Question For Review, But The Petition Should Still Be Granted.

Petitioners have stated their first question for review as follows:

> In a case alleging a Sherman Act conspiracy, where defendants sold milk to plaintiffs via middlemen who were identified as co-conspirators, were the middlemen indispensable parties by virtue of this Court's decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977)?

Respondents contend that the above statement begs the question of whether, under *Illinois Brick,* an action may be maintained at all by the first injured party in a distribution chain where the middleman is part of a price fixing conspiracy. Respondents take the position that such an action is not allowed, whether or not the middleman is joined.

Respondents' contentions, though, argue in favor of granting the petition. At best, respondents' argument is that a second question (whether proof of passing-on is allowed where the middleman is a co-conspirator) is subsumed under petitioners' first stated question (whether the middleman co-conspirator is an indispensable party).

The question raised by respondents was not decided by the Eighth Circuit, which simply assumed an action by the first injured party was permissible in the middleman conspirator case. (App. 3a-4a) However, in light of the importance of the *Illinois Brick* issues presented, petitioners agree that respondents' question should be included in this Court's review of the judgment of the Eighth Circuit as follows: whether proof of passed-on overcharges is allowed under *Illinois Brick* where the middleman is a member of the alleged conspiracy?

The factual contentions of certain respondents that market forces were not superseded and that there were additional middlemen are beside the point and, in any event, erroneous.* The district court disposed of this case on a motion for summary judgment (App. 12a), and the Eighth Circuit correctly assumed that market forces were superseded and that petitioners did purchase directly from co-conspirators. (App. 3a-4a) Moreover, respondents' own citations show that McMahon was a delivery service, Centrella was a billing agent (App. 31a), and neither was an intermediate purchaser of milk. Since petitioners purchased from members of the conspiracy and were the first parties injured by the conspiracy, they should be allowed to prove their damages under *Illinois Brick*.

II. Respondents' Opposition Briefs Show That The Eighth Circuit's Decision Is In Conflict With *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968), And That The Petition Should Be Granted.

The Eighth Circuit held that, in light of *Illinois Brick*, the middlemen co-conspirators were indispensable parties. (App. 9a) Petitioners' second question for review is:

> . . . did the Eighth Circuit err by holding the middlemen to be indispensable parties without making the equitable analysis described in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968)?

Respondents argue that petitioners may not raise the above-stated question since petitioners did not identify necessary parties in their complaints nor was there a finding that necessary parties could not be joined as required by Federal Rule of Civil Procedure 19 ("Rule 19").

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* See, Opposition Of Associated Milk Producers, Inc., Associated Milk Dealers, Inc., Central Milk Producers Cooperative and Central Milk Sales Agency To Petition For Writ Of Certiorari, at 8-9.

Rule 19 contemplates: (1) a determination that there is an absent necessary party; (2) an opportunity to join the absent party or to explain why the party cannot be joined; and (3) if the absent party cannot be joined, a determination whether the action may equitably proceed in the absence of the necessary party.

In this case, the process contemplated by Rule 19 was short-circuited. On respondents' motion for summary judgment based upon *Illinois Brick*, the district court found that the middlemen were necessary parties and, at the same time, granted summary judgment in favor of respondents. On appeal to the Eighth Circuit, petitioners argued that respondents had never filed a motion to determine that necessary parties were absent and that it was inequitable to grant judgment without a prior finding of necessary parties and an opportunity to join. However, the Eighth Circuit affirmed, holding that the middlemen were indispensable parties by virtue of the criteria of Fed. R. Civ. P. 19(a) for determining necessary parties. (App. 9a)

The decision of the Eighth Circuit was in direct conflict with this Court's decision in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968), which requires an equitable analysis under Rule 19(b). The question for review presented by petitioners is based upon the holding of the Eighth Circuit and is the appropriate question for this Court to review.

III. Sentry's Petition Was Timely Filed.

The Eighth Circuit proceedings involving Illinois and Sentry were consolidated on September 30, 1982. Illinois was assigned No. 82-2162 and Sentry was assigned No. 82-2163 in that court. On March 20, 1984, the Eighth Circuit issued a single opinion and a single judgment, affirming the judgment of the district court. (App. 48a) Illinois filed a petition for rehearing, but Sentry did not. On May 18, 1984, Illinois' petition for rehearing was denied (App. 49a), and within

ninety days Illinois and Sentry filed their joint petition for writ of certiorari to review the judgment of the Eighth Circuit.

Respondents argue that Sentry's petition herein is not timely filed since the petition was filed more than ninety days from the judgment of the Eighth Circuit in the consolidated proceedings and Sentry filed no petition for rehearing.

Rule 20.4 of the rules of this Court provides:

> The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered .... However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

The reasonable construction of Rule 20.4 is that the time for Sentry to file its petition for certiorari ran from the denial of Illinois' petition for rehearing. Otherwise, Sentry and Illinois would each have been required to file its own petition to review the same judgment.

A construction of Rule 20.4 requiring duplication of petitions would have two untenable consequences. First, it would multiply the workload of this Court and the expense of litigation. Second, it would undermine the principle that there is always a particular judgment document which controls the time for seeking review. In this case, there was a single judgment document in the consolidated proceedings which became final for purposes of seeking review on May 18, 1984, when Illinois' petition for rehearing was denied.

Respondent Associated Reserve Standby Pool Cooperative asserts that Sentry's petition was untimely, relying upon a textwriter's comments on the general effect of consolidation in district courts. See 5 Moore's *Federal Practice* ¶ 42.02[3] at 42-28 to 42-29 (2d Ed. 1982). That textwriter adds that "[a]

proper consolidation, however, may cause otherwise separate actions to be treated as a single suit for the purpose of Rule 54(b)", relating to appeals from partial judgments. 5 Moore's *Federal Practice* ¶ 42.02[3], at 109 (1983-1984 Cum. Supp.). Thus, even the authority cited by respondent shows that Sentry timely filed its petition.

CONCLUSION

For the reasons set forth herein and in the petition, it is respectfully submitted that a writ of certiorari should issue to review the judgment of the Eighth Circuit Court of Appeals.

NEIL F. HARTIGAN
ROBERT E. DAVY
ARAM A. HARTUNIAN
JOEL M. HELLMAN

October 1984

NEIL F. HARTIGAN
Attorney General, State of Illinois
160 North LaSalle Street
Suite 900
Chicago, IL 60601
(312) 793-3500

ROBERT E. DAVY*
Assistant Attorney General
Acting Chief, Antitrust Division
188 West Randolph Street
Suite 2118
Chicago, IL 60601
(312) 793-2582
Attorneys for Petitioner State of Illinois

ARAM A. HARTUNIAN*
JOEL M. HELLMAN
HARTUNIAN, FUTTERMAN & HOWARD, CHTD.
55 East Monroe Street
Suite 4005
Chicago, IL 60603
(312) 372-6475
Attorneys for Petitioner Sentry Food Stores, Inc.

*Counsel of Record